IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 142 OF 2006

Yakub Punnaya Nadar and others. ..Applicants.

Vs.

The State of Maharashtra. ..Respondent.

Ms. Pooja Bhojane for the Applicants.
Mr.D.R.More, APP. for the State.

CORAM : R.S. MOHITE,J.
DATED : 27/2/2006.

P.C.

1. Heard both sides.

2. Rule. By consent, rule made returnable forthwith.

3. The present applicants alongwith some other accused are charged and being tried for committing an offence punishable under Section 396 read with 34 of the I.P.C. in the Court of the Sessions Judge at Mumbai. One of the co accused by name Ravi Devendra is found to be a juvenile and his case has been separated. His case was sent to Juvenile Court and as such, Ravi Devendra is not now being tried by the Sessions Court.

4. It appears that in the course of the investigation, a confessional statement of the juvenile accused Ravi Devendra was recorded by the Metropolitan Magistrate, 43rd Court, Borivali, Mumbai. At the stage of trial, the prosecution sought to prove this confessional statement of the juvenile accused Ravi Devendra. On behalf of the applicants an application was filed in October,2005 in the Sessions Court raising an objection to the recording of the evidence of the Metropolitan Magistrate Mr. V.S.Dixit on the ground that the confession of co accused could not be proved or used in the trial against the accused. By the impugned judgment and order dated 5.12.2005, the Additional Sessions Judge rejected the application on the footing that the prosecution could not be prohibited from leading any evidence which they desire. In my view, any confession made by co accused can be taken into consideration if proved, only if the person making the confession is being tried jointly for the same offence. Section 30 of the Indian Evidence Act provides as follows:

> "30-Consideration of proved confession affecting person making it and others jointly under trial for same offence- When more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is

> proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession".

5. In the present case the admitted position is that the juvenile accused Ravi Devendra is not being tried alongwith the present applicants. His confession therefore, even if proved by the prosecution cannot be taken into consideration.

6. In this regard, certain judgments have been cited by the parties. In case of **Ananta Dixit Vs. The State reported in 1984 Cri.L.J. 1126** a Single Judge of Orissa High Court held that Section 30 applies to a case in which the confession is made by accused tried at the same time with the accused person against whom the confession is used. The confession of an accused tried previously would be rendered inadmissible. In the case of **Suresh B. Kalani alias Pappu Kalani Vs. State of Maharashtra reported in A.I.R.1998 S.C.3258,** the Apex Court considered the question as to whether the confessional statement of the accused who was discharged and thus not facing trial could be used against the co accused. The Apex Court in the said judgment considered this question and answer the same in the negative. In Paragraph 6 of the judgment and order the Apex Court observed as under :

> "Thus said, we may turn our attention to the confession made by Dr. Bansal and Jayawant Suryarao. Under Section 30 of the Evidence Act a confession of an accused is relevant and admissible against a co accused if both are jointly facing trial for the same offence. Since, admittedly, Dr. Bansal has been discharged from the case and would not be facing trial with Kalani, his confession cannot be used against Kalani. The impugned order shows that the Designated Court was fully aware of the above legal position but, surprisingly enough, it still decided to rely upon the confession on the specious ground that the prosecution was not in any way precluded from examining Dr. Bansal as a witness in the trial for establishing the facts disclosed in his confession. This again was a perverse approach of the Designated Court while dealing with the question of framing charges. At that stage the court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence and not upon further evidence (dehors those materials) that the prosecution may, adduce in the trial, which would commence only after the charges are framed and the accused denies the charges. The Designated Court was, therefore, not at all justified in taking into consideration the confessional statement of Dr. Bansal for framing charges against Kalani."

7. In the case of **Hardeep Singh Sohal Vs. State of Punjab through CBI reported in A.I.R.2004 S.C.4783** the Apex Court was considering the scope of Section 15 of the Terrorist and Disruptive Activities (Prevention) Act (28 of 1987) where a provision similar to Section 30 of the Indian Evidence Act exists. In that case a co accused had escaped from custody and was treated as a proclaimed offender by the Special Court. The trial

proceeded in respect of the other accused. The Apex Court held that the confession of co accused who was not being tried alongwith the other accused could not be made use as against the other accused persons.

8. In the circumstances, in my view no purpose will be served by examining Metropolitan Magistrate as even if the said Magistrate proves the making of the confession by the juvenile accused the contents of the same cannot be taken into consideration to support the prosecution case. Hence, Rule is made absolute in terms of prayer clause (a) and Criminal Application No.1213 of 2005 stands allowed. Hearing of the trial is expedited.

(R. S. MOHITE, J.)